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No. 08-295

IN THE

Supreme Court of the United States

THE TRAVELERS INDEMNITY COMPANY,
TRAVELERS CASUALTY AND SURETY COMPANY
and TRAVELERS PROPERTY CASUALTY CORP.,

Petitioners,

—v.—

PEARLIE BAILEY, SHIRLEY MELVIN, GENERAL LEE COLE,
ROBERT ALVIN GRIFFIN, VERNON WARNELL, LEE FLETCHER
ANTHONY, CHUBB INDEMNITY INSURANCE COMPANY,
ASBESTOS PERSONAL INJURY PLAINTIFFS,
and CASCINO ASBESTOS CLAIMANTS,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONERS

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RULE 29.6 DISCLOSURE

The Travelers Indemnity Company is a wholly-owned subsidiary of Travelers Insurance Group Holdings, Inc., which is a wholly-owned subsidiary of Travelers Property Casualty Corp., which is a wholly-owned subsidiary of The Travelers Companies, Inc., a publicly traded company.

No publicly held corporation other than The Travelers Companies, Inc. owns 10% or more of the stock of The Travelers Indemnity Company.

Travelers Casualty and Surety Company is a wholly-owned subsidiary of Travelers Insurance Group Holdings, Inc., which is a wholly-owned subsidiary of Travelers Property Casualty Corp., which is a wholly-owned subsidiary of The Travelers Companies, Inc., a publicly traded company.

No publicly held corporation other than The Travelers Companies, Inc. owns 10% or more of the stock of Travelers Casualty and Surety Company.

Travelers Property Casualty Corp. is a wholly-owned subsidiary of The Travelers Companies, Inc., a publicly traded company.

No publicly held corporation other than The Travelers Companies, Inc. owns 10% or more of the stock of Travelers Property Casualty Corp.

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In The Supreme Court of the United States

THE TRAVELERS INDEMNITY CO., ET AL., PETITIONERS

v.

PEARLIE BAILEY, ET AL., RESPONDENTS.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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REPLY BRIEF FOR PETITIONERS

ARGUMENT

Respondents have briefed a different case than the one before this Court. They claim that the original 1986 Manville confirmation order "is not at issue" here (Bailey Br. at 8; Chubb Br. at 23); that Judge Lifland "expanded" the confirmation order when he enforced it in 2004 (Chubb Br. at 53; Bailey Br. at 12); that the direct actions enjoined by the bankruptcy court seek to hold Travelers liable "for its own conduct independent of its insurance policies to Manville" (Bailey Br. at 10; Chubb Br. at 14); and that the bankruptcy court relied on the "related to" jurisdictional prong of Section 1334(b) of the Judicial Code to bar the direct action suits.

All of these assertions are untrue. The record before this Court establishes:

- The 1986 confirmation order bars "any Person" from filing "any and all claims" "based upon, arising out of or relating to" the Travelers insurance policies. (App. 274a–275a, 439a).
- On direct appeal in 1988, the U.S. Court of Appeals for the Second Circuit rejected the same arguments advanced here—that the bankruptcy court exceeded its subject matter jurisdiction or granted Travelers a "*de facto* discharge." (App. 194a).
- Years later, asbestos claimants sued Travelers for actions taken in its capacity as Manville's insurer, including its "underwriting of the Manville policies, inspection of Manville plants, investigations of asbestos-related claims against Manville, defense of lawsuits against Manville, and negotiations of settlements of asbestos-related lawsuits against Manville." (App. 129a–130a).
- The bankruptcy court enjoined the direct actions, ruling that they are—and always have been—barred by the 1986 confirmation order. The court neither invoked "related to" jurisdiction nor "expanded" the 1986 confirmation order.
- While the bankruptcy court order was approved by both appellate courts, the Second Circuit nonetheless held that the bankruptcy court was without jurisdiction in 1986 to bar the claims in question.

The case now comes before this Court on a pure question of law: Whether bankruptcy courts have subject matter jurisdiction to confirm reorganization plans that channel, release and enjoin claims against non-debtors "based upon, arising out of or relating to" insurance policies that constitute property of the estate. As set out in Travelers' opening brief, bankruptcy courts have always had this power. Congress confirmed this power in 1994 by codifying the Manville confirmation order and making it a model for scores of other asbestos-related reorganizations.

Respondents have abandoned the Second Circuit's manifestly incorrect conclusion that bankruptcy jurisdiction is limited to the *res* of a debtor's estate. Bailey Br. at 40–41; Chubb Br. at 40. And Respondents agree that bankruptcy courts may, in appropriate circumstances, enjoin claims against non-debtors. Bailey Br. at 30; Chubb Br. at 22. To defend the result below, Respondents have briefed the facts of a case other than the case before this Court.

A. Respondents Ignore the Bankruptcy Court's Comprehensive Findings of Fact

Factual findings made by a trial court are binding and conclusive unless timely challenged and found by a reviewing court to be clearly erroneous. Fed. R. Bankr. P. 8013; *Anderson* v. *City of Bessemer City*, 470 U.S. 564 (1985). *See also Graver Tank & Manufacturing Co.* v. *Linde Air Products Co.*, 336 U.S. 271, 275 (1949) (discussing the "two court rule," under which this Court sits as a "court of law . . . rather than a court for correction of errors in fact

finding"); *Exxon Co.* v. *Sofec, Inc.*, 517 U.S. 830, 840–41 (1996) (applying same).

The facts of this case are carefully set out in sixty pages of detailed findings (App. 101a–159a) the bankruptcy court made after a multi-day hearing at which witnesses were examined and cross-examined, documentary evidence was offered and received and every Respondent in this case appeared and participated. Respondents simply ignore these factual findings.

As the bankruptcy court noted, prior to entry of the Manville confirmation order, Travelers and Manville had an extensive insurance relationship spanning three decades and involving more than 425 policies. (App. 111a–112a, 274a–275a, 439a). As Judge Lifland found, pursuant to that relationship, Travelers:

- "paid millions of dollars in counsel fees incurred in answering interrogatories and responding to document requests served on Manville, defending Manville witnesses at deposition[s], drafting legal memoranda, negotiating settlements on Manville's behalf and defending Manville at trial and on appeal in asbestos-related suits";
- "funded Manville's defense efforts virtually *in toto*, including Manville's defense of *Borel*, *Tomplait* and *Karjala*, three of the first third-party asbestos lawsuits filed in the United States";
- hired numerous claims handlers and other employees "dedicated to the Manville account"; and

- "organized . . . seminars at which Manville and its national coordinating counsel educated Travelers and local defense counsel as to Manville's history and its experience with asbestos." (App. 120a–127a).

Judge Lifland next examined the allegations made in the direct action lawsuits to determine whether these new suits were "based upon, arising out of, or related to any or all of the Policies" that Travelers sold to Manville. Judge Lifland found that the suits:

- "place Manville at the center of the development of [the 'no duty to warn'] defense and the education of Travelers about the defense theory, and suggest that this happened in the course of Travelers' fulfillment of its duty to defend Manville under the Policies";
- "rely upon acts or statements by Manville or its counsel in connection with defense of the underlying lawsuits to demonstrate the purported misconduct of Travelers";
- "constitute one concerted front in a larger campaign by the asbestos plaintiffs' bar to 'drag in more defendants'" and to hold them liable for the "sins of Manville";
- were filed by plaintiffs who "are dissatisfied with their inability to collect directly from Manville, and thus attempt to collect Manville's debts by '[p]utting [n]ew [d]efendants [i]n Manville's [c]hair'";

- "center[] on Travelers' defense of Manville in asbestos-related claims, particularly during the period from the decision in the *Borel* case in 1973 and the filing of the Manville bankruptcy petition in 1982"; and
- allege that "Travelers negligently performed inspections" at Manville plants and "conspired to deprive plaintiffs of information regarding the risks of asbestos exposure . . . because it did not share its Manville-gained asbestos knowledge." (App. 127a, 139a–144a).

On these facts, there can be no dispute that the direct action suits violate the plain terms of the 1986 Manville confirmation order. The bankruptcy court reached that conclusion,[1] the district court agreed

[1] In a misguided effort to question Judge Lifland's interpretation of the meaning and scope of the order he himself issued, Chubb cites correspondence exchanged during early negotiations of the Manville plan. The final confirmation order was entered following eighteen additional months of negotiations. Judge Lifland dismissed this correspondence as irrelevant: "Any purported arguments based on statements of the parties during the settlement drafting process or otherwise are . . . completely beside the point." (App. 169a–170a) (citing *Matter of Memorial Hospital*, 862 F.2d 1299, 1300 (7th Cir. 1988) (court rulings are "public act[s] of the government"—not "private agreement[s]" among parties)). A bankruptcy court's interpretation of its own confirmation order is entitled to substantial deference. *See, e.g.*, *In re Airadigm Communications, Inc.*, 547 F.3d 763, 768 (7th Cir. 2008) ("A bankruptcy court's interpretation of a plan it confirmed is subject to full deference as an interpretation of its own order and may be overturned only if the record shows an abuse of discretion in the interpretation."); *JCB, Inc.* v. *Union Planters Bank*, 539 F.3d 862, 869 (8th Cir. 2008) (same). No court on direct review and no court below relied on the irrelevant materials Chubb cites. *Cf. Graver Tank*, 336 U.S. at 275.

and affirmed and the Second Circuit likewise upheld the core factual findings that "the instant claims against Travelers 'arise out of' its provision of insurance coverage to Manville." (App. 33a).

The Second Circuit reversed on a purely legal issue, brushing aside Judge Lifland's factual findings as being (in the Second Circuit's view) "of little significance from a jurisdictional standpoint." (App. 32a). Respondents cannot now defend the ruling below by "spinning" the evidentiary record into something more to their liking by, for example, saying that the direct actions either "have nothing to do with 'the conduct of, claims against, or demands on' . . . Manville" (Bailey Br. at 31–32) or "seek to recover from [Travelers] without regard to the terms or limits of any insurance policies" sold to Manville (Chubb Br. at 12). Such characterizations are rebutted by the record and should be rejected.

B. Congress Lawfully Conferred Subject Matter Jurisdiction on the Bankruptcy Court to Enter and Enforce the Manville Confirmation Order

The Constitution vests Congress with plenary power to make "uniform Laws on the subject of Bankruptcies," art. I, § 8, cl. 4, that apply notwithstanding "any Thing in the Constitution or Laws of any State to the Contrary," art. VI, cl. 2. Congress, in turn, entrusted the Judiciary with federal jurisdiction over "all cases under title 11," "all civil proceedings arising under title 11, or arising in or related to cases under title 11" and "all the property, wherever located, of the debtor as of the

commencement of such case, and of property of the estate." 28 U.S.C. §§ 1334(a), (b), (e)(1).[2]

1. "Arising Under" and "Arising In"

Judge Lifland exercised "arising under" and "arising in" jurisdiction when he confirmed the Manville plan of reorganization in 1986. 28 U.S.C. § 1334(b); *id.* §§ 157(b)(1), (b)(2)(L); *see Stoll* v. *Gottlieb*, 305 U.S. 165, 171 (1938) (construction and application of bankruptcy statute "enacted pursuant to constitutional grants of power" constitutes "federal question"). The confirmation of the Manville plan was a "civil proceeding" arising under and arising in title 11. The bankruptcy court's power to enter particular components of the Manville confirmation

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[2] "'Jurisdiction,' this Court has observed, 'is a word of many, too many, meanings." *Kontrick* v. *Ryan*, 540 U.S. 443, 454 (2004) (quoting *Steel Co.* v. *Citizens for a Better Environment*, 523 U.S. 83, 90 (1998)). With respect to bankruptcy matters, the term is used three ways. *First*, there is "true" subject-matter jurisdiction, which is vested in the Judiciary by Section 1334 of the Judicial Code. *Kontrick*, 540 U.S. at 452–53. There is no true jurisdictional question in this case, which falls squarely within the terms of Section 1334. *Second*, there is the separate question of whether judicial officers without Article III status may exercise "[t]he judicial Power of the United States," U.S. Const. art. III, § 1. *See Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50 (1982). That is not at issue here. 28 U.S.C. § 157(b)(2)(L) (confirmation orders are core). *Finally*, there is the colloquial use of the term to describe a court's proper exercise of the power conferred by Congress under the Bankruptcy Clause. Respondents invoke "jurisdiction" only in this third sense. But the substantive merits of Judge Lifland's 1986 confirmation order and 2004 enforcement of that order do not implicate the bankruptcy court's adjudicatory power.

order is a substantive question of whether the proposed plan "complies with the applicable provisions of this title," 11 U.S.C. § 1129(a)(1) (prerequisite to confirmation), and not, as the Second Circuit concluded, a question of "subject matter jurisdiction."

The Second Circuit affirmed Judge Lifland's jurisdiction to enter the confirmation order on direct appeal in *MacArthur Co.* v. *Johns-Manville Corp.*, 837 F.2d 89 (2d Cir. 1988) (App. 188a–203a), and *Kane* v. *Johns-Manville Corp.*, 843 F.2d 636 (2d Cir. 1988). In particular, the Second Circuit ruled that the insurance injunction component of the confirmation order—which it described as "enjoin[ing] all future suits against the insurers related to settled policies"—is the "cornerstone" of the plan and "a critical part of the entire reorganization." (App. 189a, 192a). As such, the entire confirmation order—including the injunction protecting Travelers—was ruled to be within the subject matter jurisdiction of the bankruptcy court. Critically, *Respondents do not contend otherwise*.[3]

Moreover, Respondents' effort to impugn the jurisdictional basis of the 1986 confirmation order is foreclosed by Congress's specific codification of the Manville confirmation order in Section 111 of the Bankruptcy Reform Act of 1994, Pub. L. No. 103–394, 108 Stat. 4106 (Oct. 22, 1994), *codified at* 11 U.S.C. §§ 524(g) & (h). Congress modeled that law on the

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[3] Chubb Br. at 23 ("respondents do not challenge [the] 1986 order"); *id.* at 55 (respondents make "no attack on the confirmation order"); Bailey Br. at 8 ("confirmation of the Manville plan . . . is not at issue in this case").

Manville bankruptcy, and expressly "grandfathered" the Manville confirmation order into Section 524(g) via Section 524(h). While neither Section 105 nor Section 524 confers jurisdiction, it would be nonsensical to presume that Congress codified the substance of a result that exceeds the jurisdiction Congress itself provided over "all civil proceedings arising under title 11." 28 U.S.C. § 1334(b); *see also* S. REP. NO. 102–279, at 5 (1992).

Chubb recasts Sections 524(g) and (h) as too narrow to bar the direct action claims against Travelers, arguing that courts may "bar claims against non-debtor insurers only to the extent such claims seek to recover on account of the *debtor's* conduct and would thus risk reducing the *debtor's* insurance and depleting the estate." Chubb Br. at 11–12 (emphasis added). Thus, under Chubb's position here, Section 524(g) has no applicability to "third parties facing claims arising out of their own allegedly tortious conduct," including any claims of bad-faith claim handling or other allegations of extracontractual liability. *Id.* at 34–35.

In addition to its utter lack of support in the actual words of the statute, Chubb's position in this Court is wholly inconsistent with Chubb's own sponsorship of numerous 524(g) injunctions substantively identical to the Manville injunction. Chubb has contributed hundreds of millions of dollars to asbestos bankruptcy trusts in support of injunctions that Chubb now tells this Court are impermissible. In the recent *J.T. Thorpe* asbestos bankruptcy, for example, in which Chubb contributed $45 million to a bankruptcy trust, Chubb sought and obtained protection from any claim arising from

Chubb's "insuring relationship with any of the Debtors, including any claim for 'bad faith' or extra-contractual liability." *In re J.T. Thorpe, Inc.*, No. 02–14216 (Bankr. C.D. Cal. July 14, 2005). Similarly, in the *Swan* asbestos bankruptcy, claimants are enjoined from suing Chubb for any claim "based upon, relating to, arising out of, or in any way connected with [the debtor] or . . . any insurance coverage that may apply to [the debtor]." *In re Swan Transportation Co.*, No. 01–11690 (Bankr. D. Del. Sept. 1, 2005).

There are dozens of other confirmation orders in asbestos-related bankruptcy proceedings containing language similar or identical to the orders entered by Judge Lifland in the Manville bankruptcy. The judges that entered these orders, the appellate courts that affirmed them, and the numerous debtors, insurers and claimants who have long relied on them have properly looked to the Manville confirmation order as precedent, as did Congress when it enacted the Bankruptcy Reform Act of 1994. *See* H.R. REP. NO. 103–835, at 40 (1994). Chubb's claim that the Manville confirmation order sweeps too broadly is an abrupt and inconsistent about-face and should be weighted accordingly. *Cf. McCoy* v. *Wisconsin Court of Appeals*, 486 U.S. 429, 440–41 & n.14 (1988) (litigants must "act with candor in presenting claims for judicial resolution," which necessarily requires "disclos[ure of] facts and law contrary" to their interests) (citing ABA Model Rules of Professional Conduct Rule 3.3(a) (1984 ed.)).

2. "Related To"

Respondents miss the mark because they ignore the "arising under" and "arising in" jurisdictional grants in Section 1334(b) and instead try to shoehorn Judge Lifland's 2004 enforcement of the confirmation order into the "related to" prong of Section 1334(b). Judge Lifland did not need to invoke "related to" jurisdiction. Rather, he affirmed the well-settled principle that a bankruptcy court's power to enter a confirmation order (which is derived from "arising under" and "arising in" jurisdiction) carries with it the power to enforce that order. *Local Loan Co.* v. *Hunt*, 292 U.S. 234, 239 (1934) ("a federal court of equity has jurisdiction . . . to secure or preserve the fruits and advantages of a judgment or decree rendered therein") (citing *Root* v. *Woolworth*, 150 U.S. 401, 410–12 (1893)); *Julian* v. *Central Trust Co.*, 193 U.S. 93, 112–14 (1904); *Riverdale Cotton Mills* v. *Alabama & Georgia Manufacturing Co.*, 198 U.S. 188, 194 (1905); *Freeman* v. *Howe*, 65 U.S. 450, 460 (1860)).[4]

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[4] The Court need not address Respondents' "related to" arguments, as any one of the three prongs of Section 1334(b) suffices to confer subject matter jurisdiction on the bankruptcy court. However, "related to" jurisdiction is in fact present here. The 1986 confirmation order proscribes suits "based upon, arising out of or relating to" the Travelers insurance policies (App. 274a–275a, 439a), and Judge Lifland's findings of fact demonstrate that suits stemming from Travelers' provision of insurance to Manville and its pervasive obligations thereunder for a period of three decades are sufficiently "related to" Manville and the Manville estate to fall within the final prong of Section 1334(b).

Aside from Respondents' "related to" argument, nothing remains of their position that subject matter jurisdiction is lacking. Respondents no longer dispute that bankruptcy jurisdiction extends beyond the *res* of a debtor's estate, or that it may be exercised to protect non-debtors in appropriate circumstances. Bailey Br. at 40–41; Chubb Br. at 40.[5] Respondents are not really complaining about subject matter jurisdiction at all—they are complaining about the substantive merits of the relief included in the confirmation order in 1986 and enforced in 2004. Chubb all but concedes this: "Petitioners' jurisdictional arguments—even if correct—thus provide no basis for reversing the Court of Appeals' judgment." Chubb Br. at 43.

Respondents' effort to convert the question of the proper exercise of bankruptcy court jurisdiction into one of subject matter jurisdiction is misguided. In *Continental Illinois National Bank & Trust* v. *Chicago, Rock Island & Pacific Railway*, 294 U.S. 648 (1935), for example, this Court rejected an assertion that a bankruptcy court exceeded its "jurisdiction" by enjoining claims when injunctions of the type at issue were "within the contemplation of [the Bankruptcy Act]." *Id.* at 677. The Court held that the challenge to the exercise of that injunctive power "presents a

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[5] It is notable that Respondent Bailey's appendix of Supreme Court decisions that supposedly do not involve non-debtors fails to account for the result in *United States* v. *Energy Resources Co.*, 495 U.S. 545 (1990), in which this Court affirmed a bankruptcy court's power to approve a reorganization plan mandating allocation of post-confirmation tax payments in a manner designed to relieve non-debtor officers of their personal liability for the payments in question.

question addressed not to the power of the court but to its discretion . . . ." *Id.*[6]

The Second Circuit erred in concluding that Judge Lifland had no "subject matter jurisdiction" to enforce the 1986 confirmation order. That error infected the entirety of the opinion below, and requires reversal.

C. Respondents Never Adequately Address the Two Other Infirmities in the Second Circuit's Ruling

In addition to the court of appeals' erroneous limitation of bankruptcy jurisdiction to the *res* of a debtor's estate (a limitation no Respondent defends), reversal of the ruling below is required for two additional, independent reasons: the Second Circuit erred in concluding that a federal bankruptcy confirmation order contained in a final judgment

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[6] The Bankruptcy Code gives federal courts (including appellate courts) a number of tools to address the propriety of any orders that are not authorized by the Bankruptcy Code and any alleged overreaching of a bankruptcy court's exercise of its jurisdiction. *See* Travelers' Opening Br. at 37 n.9. For example, before confirming a plan, a bankruptcy court must make a specific determination that the plan, *inter alia*, "complies with the applicable provisions of this title." 11 U.S.C. § 1129(a)(1). Section 524(g) also contains detailed additional requirements that must be satisfied prior to issuance of an asbestos-related channeling injunction. 11 U.S.C. § 524(g)(2)(B) (App. 472a–473a). In addition to being affirmed after full appellate review by the district court and the Second Circuit in 1988, the Manville plan was found by Congress to satisfy these strict requirements. 11 U.S.C. § 524(h); H.R. REP. NO. 103–835, at 40 (1994).

cannot enjoin the prosecution of state law claims, and the Second Circuit rewrote a 1986 final order on collateral review. Any one of the three errors in the ruling below is sufficient to reverse the Second Circuit's judgment, yet Respondents barely address the latter two.

1. Supremacy Clause

Neither opposition brief addresses the Second Circuit's unprecedented conclusion that, when alleged state law-created causes of action are channeled, enjoined and released in a *federal* confirmation order, *state* law determines whether they can be pursued post-confirmation. Respondent Bailey fails to cite (let alone discuss) the Supremacy Clause or this Court's ruling in *Perez* v. *Campbell*, 402 U.S. 637 (1971), and Chubb's tepid defense of the Second Circuit's ruling boils down to this: "State law came into play . . . only because the [direct actions] were *state-law* claims. Accordingly, . . . it was necessary to look to state law in order to determine the nature of those claims." Chubb Br. at 49.

But Chubb fails to explain *why* it is "necessary to look to state law" or to "determine the nature" of purported state-law claims. Most claims against bankrupt debtors are based on and "defined" by state law, *see id.* at 49–50 (citing *Butner* v. *United States*, 440 U.S. 48 (1979)), but the disposition of all claims—whether of federal or state origin—resolved in a federal bankruptcy court's final confirmation order are subject to the injunctive provisions of that order, subject to review on direct appeal. *Local Loan Co.*, 292 U.S. 234; *Hanover National Bank* v. *Moyses*, 186 U.S. 181 (1902). And that is the case regardless of

whether the bankruptcy court would have jurisdiction to adjudicate the barred claims in the first instance. *Local Loan Co.*, 292 U.S. at 239. *Cf. Matsushita Electric Industrial Co.* v. *Epstein*, 516 U.S. 367 (1996) (state court judgment approving a class action settlement validly resolved federal claims even though state court would not have had subject matter jurisdiction to adjudicate those claims).

2. Finality and Repose

Nor do the opposition briefs seriously address the Second Circuit's decision to rewrite on collateral review the same final confirmation order it had affirmed in full 20 years before. Unable to defend this highly irregular result, Respondents sidestep it by professing not to take issue with the 1986 confirmation order—only the bankruptcy court's 2004 enforcement of that order. This distinction is illusory.

It is the 1986 confirmation order that bars "any Person" from filing "any and all claims" "based upon, arising out of or relating to" Manville's insurance policies. (App. 274a–275a, 439a). It is the 1986 confirmation order that channels all such claims—whether sought to be asserted against Manville or Travelers—to the Manville trust. (App. 137a). And it is the 1986 confirmation order that requires every individual who submits a claim to the Manville trust to execute a full release of all claims that fall within the scope of the 1986 injunction—including claims against Travelers. (App. 138a–139a). These broad releases have been executed by over 660,000 asbestos

claimants (App. 139a), including virtually all of the Respondents in this case.[7]

Finally, the very objections raised by Respondents in this case to Judge Lifland's jurisdiction were raised and decided by the Second Circuit when it affirmed the confirmation order on direct appeal in the 1988 *MacArthur* decision, rejecting the assertion that "the Bankruptcy Court lacked jurisdiction and authority to enjoin suits against Manville's insurers." (App. 194a). Indeed, *certiorari* was sought to reverse the Second Circuit's decision on the following ground:

> The Bankruptcy Court Order Permanently Enjoining A Non-Debtor From Pursuing Its Independent Contractual Rights Against A Non-Debtor Exceeds The Jurisdiction Of [The Bankruptcy] Court . . . . [Petition for Writ of *Certiorari*, *MacArthur Co.* v. *Johns-Manville Corp.*, Case No. 87–2082 (filed June 20, 1988).]

This Court's denial of MacArthur's petition for *certiorari*, *see MacArthur Co.* v. *Johns-Manville Corp.*, 488 U.S. 868 (1988), made the 1986 confirmation order final. For the Second Circuit to

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[7] Of the 5,638 asbestos claimants who are purportedly parties to this appeal, all but two have received awards from the Manville trust and signed releases—and the other two "have claims against the Manville Trust that they have not yet submitted." Bailey Br. at 13. Clearly every Manville claimant who signed a release of claims "based upon, arising out of or relating to" the Travelers insurance policies in exchange for awards from the Manville trust cannot now complain that the bankruptcy court lacked power to enforce the terms of that release.

re-open the validity of the 1986 confirmation order now by sustaining a collateral attack on the same grounds as those rejected on direct review two decades before is untenable. The judicial system cannot function where issues clearly, directly and conclusively resolved on direct appeal can be "re-decided" 20 years later. *Cf. Celotex Corp.* v. *Edward*s, 514 U.S. 300, 312 (1995) (where jurisdiction exists over a proceeding in which an injunction was issued, courts should not address the merits of the injunction in a collateral proceeding).[8]

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[8] The Court need not and should not address the due process and other constitutional arguments raised by *amici* law professors Jagdeep S. Bhandari, *et al.* No party raises any such issues and none of the courts below passed upon these issues—and for good reason. Early in the reorganization process, "the Bankruptcy Court [appointed] a legal guardian for the future claimants," reasoning that future claimants were "entitled to a voice in the proceedings." *Kane*, 843 F.2d at 639; *see In re Johns-Manville Corp.*, 36 B.R. 743 (Bankr. S.D.N.Y. 1984) (order appointing future claimants' representative), *aff'd*, 52 B.R. 940 (S.D.N.Y. 1985). "Additionally, the Court invited any person who had been exposed to Manville's asbestos but had not developed an illness to participate in the proceedings, and two such persons appeared." *Kane*, 843 F.2d at 639–40. The futures' representative participated in all aspects of the original Manville reorganization, and was instrumental in negotiating the terms of the Manville trust and associated injunctions. Congress adopted Judge Lifland's use of a futures' representative when it codified the Manville injunction in Section 524(g) and (h) of the Bankruptcy Code. 11 U.S.C. §§ 524(g)(4)(B)(i), (h)(1)(B) (App. 477a–479a). No direct action plaintiff raised any issue concerning the futures' representative, and among the *amici* supporting Travelers' arguments in this Court are individuals who have served as futures' representatives in scores of asbestos bankruptcies. Finally, as noted above, virtually all of the asbestos claimants who are parties to this appeal voluntarily filed claims with the Manville

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In sum, the Second Circuit's and Respondents' crabbed theory of bankruptcy jurisdiction has no constitutional or statutory basis and would, if adopted by this Court, have disastrous and unforeseeable effects on the ability of the Nation's bankruptcy courts to reorganize troubled enterprises.[9] Respondents ask this Court to trade the virtues of "flexibility and equity built into Chapter 11 of the Bankruptcy Code," *NLRB* v. *Bildisco &*

Trust pursuant to the bankruptcy court's prior orders in this case and voluntarily released Manville's insurers, including Travelers.

[9] Several examples illustrate the potential for unintended consequences. Congress has exercised its power to enact "uniform Laws on the subject of Bankruptcies," U.S. Const. art. I, § 8, cl. 4, in legislation outside of title 11. One of the most important energy laws enacted since World War II, the Price-Anderson Act, Pub. L. No. 85–256, 71 Stat. 576 (Sept. 2, 1957), establishes procedures for bankruptcy-like judicial proceedings following a catastrophic nuclear accident. The law centralizes claims before an Article III judge, who is given broad power to, *inter alia*, limit the liability of non-debtors and stay execution of court judgments. *Id*. § 4, *codified at* 42 U.S.C. § 2210. Congress cited its power under the Bankruptcy Clause as authority for enacting the legislation. S. REP. NO. 85–296 (1957). It is likewise notable that legislation presently under consideration in response to the current financial crisis depends upon bankruptcy jurisdiction robust enough to address the complexity and interconnectedness of stakeholders in the mortgage crisis (including first lienholders, second lienholders, servicers, underwriters and investors in mortgage-backed securities). In considering Respondents' sweeping statements concerning the limitations of the Bankruptcy Clause, it is wise to tread lightly in an area so fraught with the potential for unintended consequences.

Bildisco, 465 U.S. 513, 525 (1984), for the vice of an artificial limiting boundary that is neither authorized by law nor workable in practice.

CONCLUSION

For the reasons set out above and in the opening brief, Travelers respectfully submits that the Second Circuit's opinion must be reversed and the case remanded for further proceedings.

Respectfully submitted,

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